

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KELLY LILLY

Claimant

VS.

INTERSTATE BRANDS CORPORATION

Self-Insured Respondent

Docket No. 1,029,887

ORDER

Claimant requests review of the September 15, 2006 Order Denying Temporary Total Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for payment of medical bills and temporary total disability benefits (TTD) as he found that claimant's accidental injury did not arise out of and the course of her employment.

The claimant requests review of this decision alleging the ALJ erred or exceeded his jurisdiction in denying her request for benefits. Claimant argues that the testimony, coupled with the medical evidence, shows that her work activities aggravated her pre-existing foot condition and as a result, she has been unable to work, and requires additional medical treatment.

Respondent argues that the ALJ's order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant injured her right foot at a children's party on June 9, 2006. She was treated at the emergency room and diagnosed with a nondisplaced metatarsal fracture. Claimant was initially released to return to work with crutches, a limitation respondent could not accommodate. Then, she was released to return with an orthopaedic shoe which was

unacceptable as well. On June 19, 2006 claimant's physician released her to work, but recommended she be allowed to rest and elevate her foot as much as 30 minutes every 2 hours. Apparently she knew this would be unacceptable so the physician provided her with a written release to return to work without restrictions at her request. Claimant worked June 21 and 22, 2006, and testified that she was not allowed to take breaks or elevate her foot during this time.

Claimant's symptoms escalated and, on June 23, 2006, she was again taken off work for a 2 week period. The medical records indicate that at least one medical individual believes the lack of foot support while standing on her feet in her covered shoe "probably" aggravated her foot condition.¹ Claimant was also seen by Dr. Lynn Curtis, who also opined that she is continuing to aggravate her foot. However, Dr. Curtis goes on to say that claimant may possibly have been misdiagnosed at the hospital, and that she is in need of an MRI and a CAT scan of her foot due to her ongoing complaints of pain.

After considering the record as a whole, this Board Member finds the ALJ's preliminary hearing Order should be affirmed. In order for a claimant to collect workers compensation benefits she must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.²

Claimant is correct when she states that an employee is not to be denied compensation merely because of a preexisting condition.³ But in order to establish an entitlement to compensation for the aggravation of a preexisting condition, there must be an aggravation due to the employee's work activities. The medical records show that claimant was off work for a period of time immediately following her foot injury. Then on June 19, 2006, she returned to see the nurse practitioner. At this point, she reported "10 days of pain right foot".⁴ Claimant told the nurse practitioner that she was wanting to return to work, but indicated that the pain would only be manageable if she had breaks every 2-1/2 - 3 hours. And claimant also indicated that compressing the foot in an uncomfortable shoe increases her pain.

¹ P.H. Trans., Ex. 1 (Katie Stockwell's June 23, 2006 office note).

² *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

³ K.S.A. 44-501(c).

⁴ P.H. Trans., Ex. 1 at 2 (Dr. Saylor's June 19, 2006 office note).

Given this evidence, this Board Member agrees with the ALJ's conclusion that claimant has failed to establish that she suffered a compensable aggravation of her foot. Claimant certainly suffered a nonwork related injury to her foot, but her ongoing complaints of pain were merely that, ongoing as of the onset of her foot injury. The fact that she worked for 2 days did not, under these facts, constitute an aggravation that gives rise to a work-related injury. Accordingly, the ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order Denying Temporary Total Compensation of Administrative Law Judge Brad E. Avery dated September 15, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
M. Joan Klosterman, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge

⁵ K.S.A. 44-534a.